FILED BY CLERK
JUN 17 2010
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

ROBERT W., Appellant, v. ARIZONA DEPARTMENT OF ECONOMIC SECURITY, SETH W., and ETHAN W., Appellees.	2 CA-JV 2010-0021 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. J18740600

Honorable Peter W. Hochuli, Judge Pro Tempore

AFFIRMED

Jacqueline Rohr
Tucson
Attorney for Appellant

Terry Goddard, Arizona Attorney General
By Claudia Acosta Collings
Tucson
Attorneys for Appellee Arizona
Department of Economic Security

E C K E R S T R O M, Presiding Judge.

¶1 On January 20, 2010, at a hearing appellant Robert W. did not attend, the juvenile court terminated his parental rights to his sons, then-seven-year-old Seth W. and five-year-old Ethan W. The statutory grounds for termination were abuse or neglect, *see* A.R.S. § 8-533(B)(2), and fifteen-month, out-of-home placement. *See* § 8-533(B)(8)(c). On appeal, Robert contends there was insufficient evidence to prove either ground by clear and convincing evidence or to prove by a preponderance of the evidence that terminating his rights was in the children's best interests.

¶2 To terminate a parent's rights, a juvenile court must find by clear and convincing evidence that at least one statutory ground for severance exists and must find by a preponderance of the evidence that terminating the parent's rights will serve the best interests of the children. *See* A.R.S. §§ 8-533(B), 8-537(B); *Kent K. v. Bobby M.*, 210 Ariz. 279, ¶ 41, 110 P.3d 1013, 1022 (2005). We will affirm an order terminating parental rights unless we must say as a matter of law that no reasonable person could find those essential elements proven by the applicable evidentiary standard. *Denise R. v. Ariz. Dep't of Econ. Sec.*, 221 Ariz. 92, ¶ 9, 210 P.3d 1263, 1265-66 (App. 2009). We view the evidence in the light most favorable to upholding the court's order. *Manuel M. v. Ariz. Dep't of Econ. Sec.*, 218 Ariz. 205, ¶ 2, 181 P.3d 1126, 1128 (App. 2008).

¶3 Robert resides in El Paso, Texas, and is married to the boys' mother, Rebecca. In May 2008, Rebecca left El Paso and moved to Tucson with Seth and Ethan, their half-sister Chyane, and Rebecca's current boyfriend.[1] In Tucson, Rebecca and the children lived in a succession of shelters, where Rebecca was observed regularly screaming at and hitting the children. She was also reported to be using marijuana and cocaine, an allegation she later admitted.

[1]Neither Rebecca nor Chyane is a party to this appeal.

¶4 After substantiating a report that Rebecca was abusing the children physically and emotionally, the Child Protective Services (CPS) division of the Arizona Department of Economic Security (ADES) took them into protective custody and filed a dependency petition in July 2008. At a settlement conference in September, both Robert and Rebecca admitted the allegations of an amended dependency petition. The juvenile court adjudicated the children dependent and approved a case plan goal of family reunification.

¶5 The allegations Robert admitted in September 2008 included that he had not seen the children since May 2008; that he is a registered sex offender and was then on probation and participating in sex-offender treatment in Texas; that his felony conviction had involved a four-year-old victim; that he has a history of cocaine and marijuana use; that he "does not work and has no income of any kind"; and that he had been unable to protect his children from their mother's abuse, neglect, drug abuse, and instability, although he claimed to have "contact[ed] authorities without success."

¶6 From July 2008 until February 2009, the children lived with a licensed foster family. In February 2009, all three were placed with their maternal grandfather and step-grandmother. At a dependency review hearing in April 2009, the juvenile court noted that Robert was "in full compliance" with his case plan but that the court had notified him it "d[id] not approve a case plan goal of family reunification with him." At the permanency hearing in July 2009, Robert appeared telephonically, and the court noted he was in compliance with his case plan "as best as he can be given his circumstances." At a further review hearing on October 29, 2009, the court found Robert was not then in compliance with the case plan and ordered the case plan goal changed to severance and adoption.

¶7 Thereafter, on November 3, 2009, ADES filed a motion to terminate Robert's parental rights. On January 14, 2010, without explanation, Robert failed to appear for a facilitated settlement conference of which he had personal notice. His counsel did not know why Robert was absent and stated she had been unable to contact him using either of the telephone numbers she had for him.

¶8 On January 20, the date the contested termination hearing was scheduled to begin, Robert similarly did not appear, and once again his counsel had no information about or explanation for his absence. The juvenile court found Robert had received actual notice of the hearing, had failed to show good cause for his nonappearance, thereby had waived his legal rights, and effectively had admitted the factual allegations in the motion. Based on the admitted allegations, the testimony of the CPS case manager, and—implicitly—on the other evidence in the record, the court granted the motion for termination.

¶9 By failing to appear for the termination hearing, Robert effectively admitted the motion's allegations that he had failed to protect his children from Rebecca's abuse and neglect; that, despite diligent efforts by ADES to provide reunification services, he had been unable over more than fifteen months to remedy the cause of his sons' dependency; and that he likely would not be able to parent them in the near future. The available record fully supports those allegations. In addition to Robert's lack of employment or income, his reportedly being disabled from a back injury, and his currently being on probation in Texas for a sex offense involving a child, his status as a registered sex offender meant Texas authorities would not approve him as a placement for his children, who therefore could not be returned to his custody.

¶10 Thus, in a progress report to the juvenile court dated December 19, 2008, and admitted in evidence at a hearing on January 7, 2009, the CPS case manager wrote:

> [Robert] was denied an ICPC [Interstate Compact on the Placement of Children, *see* A.R.S. § 8-548] home study due to the following circumstances: [He] is a registered sex offender. [He] was investigated for Physical Abuse of Seth W[.] in May 2003, the disposition was Unable to Determine. [He] was investigated for Neglectful Supervision of Seth W[.], Ethan W[.], and Chyane D[.] in March, 2006, the disposition was Reason to Believe. [He] has a history of drug use.
>
> [Robert] also continues to be unemployed and without income or any means of providing for his children's basic needs.

¶11 The juvenile court's minute entry from that January 2009 hearing reflects Robert was "concerned that the ICPC was denied and ha[d] a letter from Texas that he could parent his own children." The minute entry further notes that, "[b]y statute, [ADES] is prohibited from sending minors to another state if that state does not agree to accept custody." And it shows the court had "direct[ed] [Robert] to contact the Texas ICPC" if he wished to pursue the issue further. Robert does not contend, nor does the record reflect, that he did so. Indeed, the minute entry from the next dependency review hearing on April 7, 2009, states the court had "notified [Robert] that the Court does not approve a case plan goal of family reunification with him" but had approved his having telephone contact with Seth and Ethan. The record thus establishes that Robert could not parent Seth and Ethan, because authorities in both Texas and Arizona deemed him unsuitable as a placement for the children.

¶12 Although Robert now asserts the evidence presented at the severance hearing was insufficient to support termination of his parental rights on either statutory ground, the exhibits "previously admitted during various dependency hearings" were all "part of the record the juvenile court could consider in conducting a default hearing." *Adrian E. v. Ariz. Dep't of Econ. Sec.*, 215 Ariz. 96, ¶ 23, 158 P.3d 225, 231-32 (App. 2007); *see also* Ariz. R. P. Juv. Ct. 64(C), 66(D)(2); *Manuel M.*, 218 Ariz. 205, ¶ 34, 181 P.3d at 1136 ("[E]xhibits . . . duly admitted at prior hearings were part of the record and thus properly considered by the court."). Here, those previously admitted exhibits provide clear and convincing evidence to sustain severance on both grounds alleged.

¶13 The record also supports the juvenile court's finding by a preponderance of the evidence that terminating Robert's rights was in the best interests of the children. The case manager testified the boys were placed with their maternal grandfather and his wife, were bonded to the grandparents, appeared comfortable in their home, and seemed "to be doing really well." Further, she testified, the grandparents were meeting the boys' needs and were willing to adopt them. In the case manager's opinion, terminating Robert's rights was in the children's best interests, both because Robert was unable either to parent them himself or to protect them from their mother's abuse and neglect and because adoption by the grandparents would afford the boys much-needed stability and permanency. *See generally In re Maricopa County Juv. Action No. JS-8490*, 179 Ariz. 102, 107, 876 P.2d 1137, 1142 (1994) (evidence foster parents meeting child's needs relevant to prove best interests); *In re Maricopa County Juv. Action No. JS-500274*, 167 Ariz. 1, 5-6, 804 P.2d 730, 734-35 (1990) (child's best interests served if terminating parent's rights will confer benefit on child); *In re Maricopa County Juv. Action No. JS-*

501904, 180 Ariz. 348, 352, 884 P.2d 234, 238 (App. 1994) (freeing child for adoption can be benefit resulting from severance).

¶14 In sum, when Robert failed to appear for the contested termination hearing, he effectively waived his legal rights and admitted the factual assertions in the motion to terminate his parental rights. The record contains ample evidence to support the juvenile court's order, and therefore we affirm its termination of Robert's parental rights to Seth and Ethan.

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Judge